IN THE

Supreme Court of the United States

October Term, 1967

No. 803

UNITED STATES GYPSUM COMPANY, *Petitioner*

vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO

BRIEF IN OPPOSITION

QUESTIONS PRESENTED

1. Whether a union loses the right to arbitrate a grievance because, eighteen months after arbitration was demanded and six months after the district court ordered arbitration, the union is decertified by the National Labor Relations Board.

2. Whether, if a union's right to arbitrate is alleged to have been destroyed by a subsequent NLRB decertification, the union is entitled to litigate the validity of the decertification.[1]

3. Whether, in the circumstances of this case, the NLRB decertification was invalid.[1]

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[1] Questions 2 and 3 relate to an alternative argument presented by the Union to the court below in support of arbitration. In view of its disposition of Question 1, the court below found it unnecessary to decide these questions (Pet. App. xxi). We intend to advance them to this court, however, if certiorari is granted, as an alternative basis for affirmance, Cf. *Langnes* v. *Green*, 282 U.S. 531 (1931). For the benefit of the Court, we briefly describe the nature of these issues in Part II of this brief.

COUNTER-STATEMENT

Respondent (hereinafter "the Union") was the certified bargaining representative of the employees of the Montevallo, Alabama plant of United Cement Company. In that capacity, it negotiated a collective bargaining agreement which became effective on March 30, 1964, and was to run for a three-year term, i.e., until March 30, 1967.

On March 30, 1965, at a time when the agreement still had two years to run, Petitioner (hereinafter "the Company") purchased the Montevallo plant and continued to operate the plant without significant change. The Company announced, however, that it did not consider itself bound by the collective bargaining agreement, and it took steps which the Union believed to be violative of the agreement. Accordingly, on May 17, 1965, the Union submitted grievances alleging that the Company was violating the agreement, and demanded arbitration under the procedures specified in the agreement. It was the Company's obligation to arbitrate the Union's grievances when the demand was made. *John Wiley & Sons, Inc.* v. *Livingston,* 376 U.S. 543 (1964). The Company, however, refused to arbitrate, and on June 11, 1965, the Union filed this suit to compel arbitration.

Meanwhile, a few days after receiving the Union's grievances, the Company filed a petition with the National Labor Relations Board seeking an election to decertify the Union.

On May 27, 1966, nearly a year after the suit to compel arbitration was filed, the district court granted summary judgment in favor of the Union, and ordered the Company to arbitrate the grievances. The Court held that the Company, as a purchaser which continued to operate the plant without change, was obligated to arbitrate grievances under the seller's collective bargaining agreement. *John Wiley & Sons, Inc.* v. *Livingston, supra.* The Company filed an appeal to the Court of Appeals for the Fifth Circuit.

On October 28, 1966, while the Company's appeal was pending, the Board directed an election, which was held on December 2, 1966. Not surprisingly, in view of the Union's demonstrated impotence over more than a year and a half to get the Company to recognize it or arbitrate its grievances, the employees voted to decertify the Union.

The Company thereupon advised the Court of Appeals of the Union's decertification, and urged that it reverse the direction of arbitration, on the ground that as a matter of law a decertified Union cannot arbitrate grievances.

The Court of Appeals rejected the contention. It affirmed the district court's ruling that in light of *Wiley* the Company was obligated to arbitrate grievances under the agreement (Pet. App. xxii-xv). It then ruled that the subsequent decertification did not alter that result (*Id.* at xvi-xxiii). It noted that the Union was not decertified until a year and a half after it demanded arbitration of these grievances; that, had the Company not refused to arbitrate, the grievances would have been resolved long before the Union's decertification; and that, indeed, the Company's refusal to arbitrate might well have been one of the causes of the employees' decision to decertify the Union (*Id.* at xxi-xxii). The Court further noted that, in large part, the relief sought in the grievances was attributable to the period prior to the Union's decertification, and that if the Union were not permitted to arbitrate the grievances the employees would have contractual rights with no champion to enforce them (*Id.* at xviii-xxi). (The Court was careful to distinguish this case from those in which one Union is replaced by another, *Id.* at xix, n. 22). The Court noted the Company's conjecture that the arbitrator might render an award inconsistent in legal effect with the Board's decertification order, but stated that such questions could more appropriately be raised in enforcement proceedings if, after the arbitrator's award was rendered, such conflict appeared (*Id.* at xx-xxi).

Finally, having ordered arbitration notwithstanding the decertification, the Court found it unnecessary to pass upon the Union's alternative claim: that the Board's decertification of the Union was invalid (*Id.* at xxi-xxiii). (We discuss this claim more fully in Part II herein).

The Company, in its petition for certiorari, does not seek review of the correctness of *Wiley*.[2] The petition is limited to the issues stemming from the decertification of the Union.

ARGUMENT

I. THE WRIT SHOULD BE DENIED

In holding that the Union is entitled to arbitrate its grievances, the decision below is plainly correct and does not warrant review by this Court.

The Company's contention, stripped of legalistic jargon, is that it should reap the benefits of its own wrongdoing. The Company does not challenge the holding below that, at the time of the Union's demand, it was required to submit the grievances to arbitration. Its sole contention is that the decertification of the Union a year and a half later relieved it of that obligation. It thus seeks the benefit of the delay created by its own breach of contract. This effort comes with particular ill grace in this case for, as the Court below recognized, it may well have been the Company's refusal to recognize the Union or entertain its grievances which prompted the employees to decertify the Union. Declining arbitration would reward the Company's wrongdoing, and encourage other employers in similar situations likewise to refuse arbitration in the hope that the obligation ultimately would disappear. Moreover, since the grievances

[2] In the court below, the Company argued that *Wiley* was wrongly decided. The court, of course, held that it could not reverse a decision of this Court (Pet. App. xii-xv). The Company has now abandoned this tack; the petition does not seek reconsideration of *Wiley* by this Court.

all relate to events arising during the period prior to the Union's decertification, the Union is the appropriate party to enforce those rights. As the Court below recognized, to hold otherwise would extinguish employees' substantive rights by denying them the only agency capable of enforcing those rights.

The Company's claim that the decision below conflicts with *Garment Workers v. Labor Board (Bernhard-Altmann)*, 366 U.S. 731 (1961) is absurd. In *Bernhard-Altmann*, this Court held that an employer and union violated the Act by entering into their first agreement at a time when the union had not yet been selected by a majority of the employees. *Bernhard-Altmann* in no way precludes the decision below, which enforces arbitration of grievances filed while the Union was the certified bargaining agent involving alleged contractual violations occurring during the period the Union was certified. More to the point is *Brooks* v. *Labor Board*, 348 U.S. 96, 104 n. 18 (1954), in which this Court approved the Board's advice that an employer should continue bargaining with the certified union even after an apparent loss of majority, until the Board determines that the union should be decertified. See also, to the same effect, *NLRB* v. *Warrensburg Board & Paper Corp.*, 340 F. 2d 920 (2d Cir. 1965).

The court below properly disposed of the Company's fears that the arbitrator might render an award conflicting with the Board's decertification ruling. These fears do not warrant denial of arbitration; rather, if the arbitrator provides relief in apparent conflict with the Board, the appropriate time for correction is in a proceeding to enforce or set aside the award. Cf. *Carey* v. *Westinghouse Elec. Corp.*, 375 U.S. 261, 272 (1964).

Finally, the Company's contention (Pet. pp. 16-17) that, in ordering arbitration of the Union's checkoff claim, the decision below conflicts with *Modine Mfg. Co.* v. *Grand Lodge*, 216 F. 2d 326 (6th Cir., 1954), is erroneous. *Mo-*

dine held that a Union could not require a checkoff of dues for the period *after* it was decertified. Here, by contrast, the Union sought (and still seeks) a checkoff of dues for the twenty-one months *prior to* decertification, during which period it was the certified bargaining agent and contractually entitled to the dues.

II. IF THE WRIT IS GRANTED, ADDITIONAL QUESTIONS MUST BE CONSIDERED

In Part I, we have shown that the writ should be denied, because there is no warrant to review the decision of the court below ordering arbitration notwithstanding the decertification of the Union. In the event, however, that this Court should decide to grant the writ, it must pass upon the Union's alternative contention: that the Board improperly decertified it. Cf. *Langnes* v. *Green*, 282 U.S. 531, 538 (1931). While the court below found it unnecessary to decide this claim, if this Court were to conclude that decertification has the effects claimed by the Company then the validity of the decertification would be critical.

The Board's decisions in election cases are not directly reviewable. *American Federation of Labor v. Labor Board*, 308 U.S. 401 (1940). However, when collateral rights turn upon such decisions, their validity is litigable in the collateral proceedings. *Id.* at 406-07. The most common situation is when an employer refuses to bargain with a Union certified by the Board; the employer is allowed to challenge the validity of the certification, as a defense to the refusal to bargain charge. *Ibid.* Likewise, a Union accused of violating Section 8(b)(7) of the Act, 29 U.S.C. § 158(b)(7), by picketing within 12 months after a valid election, is entitled to defend on the ground that the election was invalid, *NLRB* v. *Local 182*, 314 F. 2d 53, 59-60 (2d Cir.

1963). So here, we submit that if a valid decertification would destroy our otherwise-extant right to arbitrate, we are entitled to show that the decertification is invalid and that our right thus survives.

Here, the decertification was invalid. In directing the election in which the Union was decertified, the Board departed from its own "contract bar" rule: that no election will be conducted during the first three years of a collective bargaining agreement. *General Cable Corp.*, 139 NLRB 1123, 1125 (1962). The Board provided absolutely no explanation for this deviation from its uniform rule, offering only the *ipse dixit* that "the purposes of the Act will best be effectuated by the direction of an immediate election herein." (Pet. App. xxx). The Board's departure is particularly egregious, for the Union was sent to its inevitable doom. The Company, having refused to recognize the Union or entertain its grievances for more than a year and a half, totally emasculated the Union in the eyes of the employees. In an ironic postscript, the Board rubbed salt in the Union's wounds by refusing to issue a complaint charging the Company with a refusal to bargain although, as the court below noted (Pet. App. xxii), under the Board's decisions the Company's conduct was plainly violative of the Act. Of course, by now this litigation has dragged on so long that even the contract has expired. That fact, however, cannot retroactively validate a decertification which was invalid when issued. Moreover, both the Board and the courts have recognized that in situations where the employer has repudiated the contract during its term, the appropriate remedy is to extend the contract for an additional period commensurate with that during which it was rendered ineffective, even though by then the Union has lost its majority status. *NLRB* v. *Warrensburg Board & Paper Corp.*, 340 F. 2d 920 (2d Cir. 1965); *Schill Steel Products, Inc.*, 161 NLRB No. 83, 63 LRRM 1388 (1966); *Bever-*

age-Air Co., 164 NLRB No. 156, 65 LRRM 1377 (1967). The Union intends to suggest in arbitration that this is an appropriate remedy for the Company's breach.

CONCLUSION

For the reasons set forth hereinabove, certiorari should be denied.

Respectfully submitted,

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